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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

VERONICA GUTIERREZ, ERIN WALKER, and WILLIAM SMITH, as individuals and on behalf of all others similarly situated,

Plaintiffs,

v.

WELLS FARGO BANK, N.A.,

Defendant.

Case No. C 07-05923-WHA (JCSx)

PLAINTIFFS' MOTION FOR JUDGMENT FOLLOWING REMAND

The Honorable William H. Alsup

Date: May 2, 2013
Time: 8:00 a.m.
Courtroom: 8, 19th Floor

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NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on May 2, 2013, at 8:00 a.m., or as soon as it may be heard, in Courtroom 8 of the Northern District of California, 450 Golden Gate Ave., San Francisco, CA 94102, Plaintiffs, on behalf of themselves and the Class, will move, and hereby do move, for: (a) re-entry of judgment, as to the "fraudulent" prong and False Advertising Law claims for which class-wide liability was affirmed by the Ninth Circuit, for restitution in the amount of $202,994,035.46; (b) an order that post-judgment interest accrue from the date of the entry of the original Judgment, *i.e.*, from October 25, 2010; (c) an injunction enjoining Wells Fargo from making false and misleading representations about its posting order; and (d) an award of pre-judgment interest in an amount to be calculated by Plaintiffs' using the transactional data for the class.

This motion is based upon this Notice of Motion and Motion, the accompanying memorandum, any further pleadings and evidence filed in connection with this motion, any argument made in connection with this motion, and the pleadings, trial record, and other record in this action.

Dated: March 14, 2013

Respectfully submitted,

LIEFF, CABRASER, HEIMANN & BERNSTEIN, LLP

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The Ninth Circuit has affirmed in part and reversed in part this Court's findings after trial, vacating the Judgment and remanding for a determination of the amount of the restitution to be awarded on the claims affirmed on appeal. *See Gutierrez v. Wells Fargo Bank, N.A.*, 704 F.3d 712 (9th Cir. 2012). Plaintiffs respectfully submit that the Court should, consistent with the Ninth Circuit's decision, re-enter Judgment in the amount previously awarded because: (a) the Court's October 2010 Final Judgment ("Judgment") awarding restitution was already, by its express terms, entered on the claims affirmed on appeal; and (b) the Court's earlier findings and the existing trial record demonstrate, in any event, that the affirmed claims completely support the full amount of the previous restitution award.

Defendant Wells Fargo Bank, N.A. ("Wells Fargo") appealed every conceivable aspect of this Court's findings, even arguing that this Court abused its discretion when it concluded from the full trial record that Wells Fargo's conduct deceived the named plaintiffs and was likely to deceive the class of its customers. However, the Ninth Circuit affirmed the core of the Court's findings. It affirmed the certification of the class, upheld the findings concerning Wells Fargo's deceitful, classwide conduct, and ruled that the statutory affirmative fraud claims were not preempted under the National Bank Act ("NBA"). In so doing, the Ninth Circuit affirmed Wells Fargo's liability to the certified class under the "fraudulent" prong of California's Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200 *et seq.* ("UCL"). Plaintiffs' claim under the "unfair" prong of the UCL was the only claim reversed on appeal for being preempted under the NBA. On remand, the Court has been tasked with determining the proper relief for the claims affirmed by the Ninth Circuit.[1]

By its express terms, the Judgment applies to *all claims* upon which Plaintiffs prevailed at trial—including the claims for which this Court's determinations of class-wide liability have now

[1] The Ninth Circuit's opinion does not address, and thus does not preempt, this Court's separate finding of liability under California's False Advertising Law, Cal. Bus. & Prof. Code §§ 17500 *et seq.* ("FAL"). However, its affirmance of class-wide liability under the "fraudulent" prong applies equally to the FAL claim which is premised on the same deceptive conduct.

been affirmed on appeal. *See* Judgment, Dkt. No. 498. Each of Plaintiffs' claims sought relief for the same wrong—*i.e.*, the assessment of excess overdraft fees—and they supported the same quantification of restitution to address that wrong. Affirmance of any one of the claims for which the Judgment was entered, entitles the class to the full amount of restitution previously ordered.

Independent of the literal interpretation of the Judgment, the Court should re-enter the same restitution award at this time, without the need for any further proceedings, because the existing record and the Court's extensive findings demonstrate that the full award is appropriate for the affirmed claims, independent of any other claims. This Court's underlying Findings of Fact and Conclusions of Law After Bench Trial ("Findings") found that Wells Fargo's affirmative misrepresentations fostered reasonable expectations among class members that their transactions would be deducted chronologically. Not only did these particular findings, affirmed on appeal, form the basis for liability under the "fraudulent" prong of the UCL, they provided the grounds upon which this Court determined the amount of the restitution award. *See* Findings (Docket No. 476) at 86. The Court's measurement of restitution following trial, and the underlying assumptions and determinations made in reaching that figure, were well supported by the trial record, were proper as to *each* of the categories of misconduct the Court found actionable following trial, and were the most appropriate measure for the claims affirmed on appeal.

Plaintiffs respectfully submit that the Court should re-enter judgment for restitution on the claims affirmed on appeal in the amount it previously entered, with post-judgment interest accruing as of the date of the original Judgment. Additionally, the Court should award pre-judgment interest as part of a new judgment because Wells Fargo has had the benefit of its ill-gotten gains for nearly 9 years. Finally, the Court should enter an injunction precisely as prescribed by the Ninth Circuit.

II. BACKGROUND

On October 25, 2010, after a two week trial, the Court entered the Judgment, expressly awarding restitution on *all* claims on which Plaintiffs prevailed at trial, including Plaintiffs' claims under the "fraudulent" prong of the UCL and the FAL that were affirmed on appeal:

FINAL JUDGMENT IS HEREBY ENTERED in favor of plaintiffs and against

> defendant Wells Fargo Bank, N.A., *for all claims on which plaintiffs prevailed* and liability was established in the August 2010 findings….The details of this judgment are set forth below:
>
> 1. Members of the certified [class] shall recover from defendant Wells Fargo Bank, N.A. restitution in the amount of $202,994,035.46….

Docket No. 498 at 1 (emphasis added).

In its 90-page Findings, the Court held Wells Fargo liable, on a class-wide basis, under: (1) the "unfair" prong of the UCL; (2) the "fraudulent" prong of the UCL; and (3) the FAL. Specifically, the Court found that Wells Fargo employed a "bookkeeping device" of re-sequencing customers' debit card transactions for the sole purpose of manufacturing additional instances of overdraft fees. The Court specifically found that Wells Fargo violated the "fraudulent" prong of the UCL and the FAL by broadly disseminating misleading marketing materials and other representations that "promoted a false perception that debit card purchases would be deducted from their accounts in the order transacted" rather than being re-sequenced in high-to-low order as was the bank's practice. *See* Findings at 54-56, 71-73.

Having found class-wide liability under these three claims, the Court turned to the issue of restitution. The Court found that Plaintiffs' expert, Mr. Olsen, was able to reliably measure, on an account-by-account basis using the bank's class-wide transactional data, the "differentials" between the overdraft fees Wells Fargo assessed on customers' accounts and what it would have assessed under various alternative posting "scenarios." Presented with multiple alternative "scenarios," the Court determined that restitution in the amount of approximately $203 million (the amount measured under the "2A" scenario) was most appropriate. *Id*. at 85-89. In making this determination, the Court carefully considered the record and the various assumptions underlying each of the alternatives. In choosing the measurement of restitution, the Court expressly grounded its choice on the expectations among class members fostered by Wells Fargo's affirmative misrepresentations. The Court stated, "[a] main theme of plaintiffs' case…is that the bank promoted the expectation that debit-card transactions would post *chronologically*. As such, restitution based on chronological posting of these transactions will most closely track depositors' expectations." *See id*. at 86 (emphasis original).

Following entry of the Judgment, Wells Fargo appealed to the Ninth Circuit.[2] On appeal, Wells Fargo advanced every conceivable argument as to why each of this Court's factual and legal findings should be reversed. With respect to the affirmed claims, Wells Fargo disputed virtually every aspect of this Court's findings. Among other things, Wells Fargo argued that: (a) this Court lacked a sufficient basis for certifying the claims for class treatment; (b) this Court's factual findings regarding Wells Fargo's dissemination of the misrepresentations and the misleading nature of those materials constituted an abuse of discretion and were unsupported by the record; (c) this Court erred in finding that the named Plaintiffs had standing to pursue these claims; and (d) Plaintiffs' claims on these issues were preempted by federal law.[3]

On December 26, 2012, the Ninth Circuit issued its opinion. Rejecting Wells Fargo's arguments, the Court of Appeals held that Plaintiffs' "fraudulent" prong claims challenging Wells Fargo's pervasive misrepresentations were not preempted. Further, it affirmed this Court's finding of class-wide liability with respect to those claims, as well as this Court's related findings regarding the standing of the named plaintiffs to pursue the claims and the propriety of class certification of the claims. *See Gutierrez*, 704 F.3d at 726-730.[4] The Ninth Circuit agreed with this Court that "[t]he pervasive nature of Wells Fargo's misleading marketing materials amply demonstrates that class members, like the named plaintiffs, were exposed to the materials and likely relied on them." *Id*. at 729. Moreover, the Ninth Circuit held that this Court's findings that Wells Fargo's representations at issue were in fact "misleading" and "likely to deceive its customers" were "amply supported" by the factual record. *Id*. at 729-30.

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[2] Plaintiffs cross-appealed on limited issues such as the Court's denial of pre-judgment interest.

[3] While its appeal was pending, and after the U.S. Supreme Court's decision in *Concepcion v. AT&T Mobility LLC*, 131 S. Ct. 1740 (2011), Wells Fargo asked the Ninth Circuit to vacate this Court's Judgment and remand the case back to this Court so that Wells Fargo could belatedly move to compel arbitration as to all claims, notwithstanding the fact that the claims had already been fully tried. It was the first time during the entire history of the litigation that Wells Fargo ever showed any interest in arbitration.

[4] Again, though the Ninth Circuit did not expressly address this Court's separate finding of liability under the FAL, its holdings regarding the "fraudulent" prong apply equally to the FAL claims. *See* Findings at 73 ("As for plaintiffs' false advertising claim, since liability under the 'fraudulent' restriction of Section 17200 has been established, liability for plaintiffs' false advertising claim under Section 17500—which is based upon the same deceptive conduct—has also been proven.").

The Ninth Circuit held, however, that the National Bank Act and corresponding regulations preempted Plaintiffs' claims under the "unfair" prong of the UCL and for Wells Fargo's fraudulent omissions. The Ninth Circuit then vacated the $203 million restitution award after mistakenly (in Plaintiffs' view) concluding that the award was "premised…only on a violation of the 'unfair' business practices prong of the [UCL]." *Id.* at 725.[5] Due to that mistake, the Ninth Circuit unnecessarily ordered that the case be remanded to this Court to determine the proper restitution for the claims affirmed on appeal. *Id.* at 730.

The Ninth Circuit also vacated the injunction regarding Wells Fargo's posting order as preempted under the National Bank Act. However, in doing so, it described the nature of an injunction that would be permissible under the National Bank Act:

> Although the court cannot issue an injunction requiring the bank to use a particular system of posting or requiring the bank to make specific disclosures, it can enjoin the bank from making fraudulent or misleading representations about its system of posting in the future.

Id. at 728.

III. ARGUMENT

A. The Court Should Re-Enter The $203 Million Restitution Judgment At This Time.

The Court should re-enter the $203 million restitution award at this time, without the need for any further evidentiary or other proceedings.

1. The October 2010 Final Judgment Independently Premised the Full Restitution Award on the Claims That Were Affirmed on Appeal.

The Judgment entered by the Court provides in pertinent part:

> **FINAL JUDGMENT IS HEREBY ENTERED** in favor of plaintiffs and against defendant Wells Fargo Bank, N.A., for *all claims on which plaintiffs prevailed* and liability was established in the August 2010 findings. ….The details of this judgment are set forth below:
>
> 1. Members of the certified [class] shall recover from defendant Wells Fargo Bank, N.A. restitution in the amount of $202,994,035.46….

[5] Plaintiffs brought this mistake to the attention of the Ninth Circuit in a Motion for Rehearing that was denied.

Docket No. 498 at 1 (emphasis added). The Findings, of course, concluded that Wells Fargo was liable to the class under both the "unfair" and "fraudulent" prongs of the UCL and under the FAL. *See* Findings at 60-73.

As the Findings make clear, although each claim presents a distinct *theory* of liability, each claim addresses the same wrongful conduct of imposing excessive overdraft fees, and therefore seeks to redress the same resulting harm, that is, by return of the excess overdraft fees. Thus, each claim upon which Plaintiffs prevailed at trail provided an independent basis for the same restitution award. That the Ninth Circuit expressly affirmed the UCL claim under the "fraudulent" prong, means that the full amount of the previously ordered restitution remains the proper amount to award after remand. *See Bingham v. Zolt*, 66 F.3d 553, 564 (2d Cir. 1995) (rejecting argument that damages award should be vacated where some claims were dismissed post-verdict and single damages award was made, finding that remaining claims and dismissed claims sought compensation for the same injury under different theories, and stating "the amount of compensatory damages awarded is not dependent on the number of theories that plaintiff alleges and under which it may recover. Rather, the amount of damages depends on the extent of the injury suffered"); *Cf. Coleman v. Tennessee*, 998 F. Supp. 840, 846 & n.6 (W.D. Tenn. 1998) ("As a practical matter, the damages award against Defendants will stand if the Court upholds the jury verdict on *either* the hostile work environment claims or the quid pro quo claims. For both Plaintiffs, the jury found that the same amount of damages should be awarded under either claim."); *Faircloth v. Finesod*, 938 F.2d 513, 518 (4th Cir. 1991) (damages award under one claim affirmed where claim providing duplicative damages reversed).

Because the Judgment already answers the question posed by the Ninth Circuit regarding restitution, Plaintiffs submit that the Court can complete its tasks on remand by entering Judgment at this time: (a) confirming that the $203 million restitution award was entered as to the "fraudulent" prong and FAL claims for which class-wide liability was affirmed by the Ninth Circuit; and (b) enjoining Wells Fargo from making false and misleading representations about its posting practices, consistent with the guidance provided by the Ninth Circuit. *See Gutierrez*, 704 F.3d at 728.

2. The Existing Record and the Court's Findings Fully Support a $203 Million Restitution Award for the Claims Affirmed on Appeal.

Independent of the literal application of the Judgment, the current record firmly supports the class' continued entitlement to restitution.

The Ninth Circuit's decision in this case makes absolutely clear that the affirmed UCL and FAL claims here are exactly the type of claims for which class-wide restitution is appropriate without individualized proof of deception, reliance, or injury.[6] Among other things, the Ninth Circuit held that:

- This Court's findings that Wells Fargo's marketing materials and other representations were "misleading" and "likely to deceive" class members were "amply supported" by the record. *Gutierrez*, 704 F.3d at 729-30.
- "[T]the pervasive nature of Wells Fargo's misleading marketing materials and other misrepresentations amply demonstrates that class members, like the named plaintiffs, were exposed to the materials and likely relied on them." *Id.* at 729.
- This Court's determination that the named plaintiffs were injured and had standing to pursue these UCL and FAL claims on behalf of the class was "well supported by the record." *Id*. at 728.

Therefore, Wells Fargo cannot be heard to argue that determinations are still needed regarding what representations each of the class members saw and when, or whether they were deceived. Those issues have already been conclusively established, consistent with applicable law, on a class-wide basis. *See Fremont Life*, 104 Cal.App.4th at 531-32 (rejecting defendant's argument that "across the board" restitution was improper without an inquiry into class members' "knowledge," as well as its related argument that such class-wide relief would constitute an improper "windfall" to class members who had "knowledge").[7]

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[6] The Ninth Circuit recognized that the California Supreme Court has long held that where, as here, a defendant broadly disseminates representations that are "likely to deceive," class restitution is available without individualized proof of deception, reliance or injury for the absent class members. *Gutierrez*, 704 F.3d at 729; s*ee also In re Tobacco II Cases*, 46 Cal. 4th 298, 320 (2009); *Committee on Children's Television, Inc. v. General Foods Corp.*, 35 Cal.3d 197, 211 (1983). This well-settled approach reflects the "concern that wrongdoers not retain the benefits of their misconduct" *Tobacco II*, 46 Cal.4th at 320 (citation omitted); *see also People ex rel. Bill Lockyer v. Fremont Life Ins. Co.*, 104 Cal. App. 4th 508, 532 (2002) (UCL and FAL "clearly authorize[] a trial court to order restitution in the absence of proof of lack of knowledge in order to deter future violations of the unfair trade practice statute and to foreclose retention by the violator of its ill-gotten gains.").

[7] Moreover, Wells Fargo had every opportunity at trial to prove that class members had actual,

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As for the measurement of restitution, while an award may not be arbitrary or unsupported by evidence, the Court remains broadly empowered to "make such orders or judgments… as may be necessary to restore to any person in interest any money or property…which *may have been acquired*" by Wells Fargo through its misconduct. Cal. Bus. & Prof. Code §§ 17203, 17535 (emphasis added); *Cortez v. Purolator Air Filtration Prods. Co.*, 999 23 Cal. 4th 163, 180 (2000) (court's discretion "very broad"). The affirmed claims fully support the full amount previously awarded, under the very logic the Court applied in quantifying restitution in the first place. The $203 million amount awarded made sense then, and it continues to make sense now.

That the Court's restitution award properly follows from the affirmed claims is further demonstrated by the fact that, in choosing the proper measure of restitution, the Court expressly grounded its choice on its findings regarding Wells Fargo's fraudulent misrepresentations:

> A main theme of plaintiffs' case, however, is that the bank promoted the expectation that debit-card transactions would post *chronologically*. As such, restitution based on chronological posting of these transactions will most closely track depositors' expectations.

Findings at 86 (emphasis original). This understanding regarding depositors' expectations, in turn, was supported by the Court's extensive findings, now affirmed by the Ninth Circuit, that Wells Fargo's affirmative misrepresentations promoted the false expectation that debit-card transactions would be posted chronologically. *See, e.g.*, Findings at 73 ("Wells Fargo affirmatively reinforced the expectation that transactions were covered in the sequence made while obfuscating its contrary practice of posting transactions in high-to-low order to maximize the number of overdrafts assessed on customers), 71 ("Wells Fargo directed misleading propaganda at the class that likely led class members to expect that the actual posting order of their debit-card purchases would mirror the order in which they were transacted."); *see also id.* at

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full knowledge. After considering all of the evidence, however, the Court properly concluded that Wells Fargo's re-sequencing practice was not within the reasonable expectations of class members, and that for all but perhaps the "angry few" who exhaustively pursued complaints all the way to the point that the bank would eventually—after the fact—explain its re-sequencing practice—no customers were told the truth. *See, e.g.*, Findings at p.71, ¶¶ 217, 218, 226, 227; *see also* Docket. No. 246 at 11-12 (rejecting wavier and voluntary payment argument on summary judgment motion, finding that "the current record does not support a finding that the plaintiffs understood Wells Fargo's overdraft policies").

¶¶ 199, 222, 223, 225 & n.16, 226, 227, 229, pp. 71-73.

This reasoning, and these same underlying factual findings supporting the Court's prior restitution award, continue to fit perfectly with the affirmed claims, which address the very misrepresentations and resulting expectations that the Court considered in choosing its measurement. Indeed, it is difficult to imagine a better fit. Wells Fargo violated the "fraudulent" prong of the UCL and the FAL by making pervasive misrepresentations that led class members to reasonably expect debit card transactions would be posted one way—chronologically—when, in fact, the bank was posting them an entirely different way for the very purpose of getting more of the class members' money. The proper restitution for this misconduct can therefore be determined by comparing—as the Court did in awarding restitution previously—the fees Wells Fargo charged under its actual practices with the fees it would have charged under an alternative posting order that retains the unchallenged aspects of Wells Fargo's practices (such as nightly batch processing, high-to-low posting for checks, and posting certain "priority debits" before others) while tracking, to the extent feasible using the data, class members' expectations based on the pervasive misrepresentations on which liability is premised.

The restitution awarded in *Fremont Life* is instructive. In that case, defendant insurance company violated the UCL and FAL when it subjected its policy holders to a "premium charge" that was not adequately disclosed either in the policies or the insurer's marketing brochures. The court of appeals affirmed the trial court's restitution award, which was designed to restore to policy holders charges that they would not have had to pay had the policies been as they were reasonably expected to be based on the representations made. *Freemont Life*, 104 Cal.App.4th at 530-32. (restitution based on the premium charges paid and interest accrued thereon was "carefully tailored to the harm perpetrated"). Here, too, restitution is still appropriately measured by reference to class members' reasonable expectations based on the bank's representations.

Moreover, the various other determinations and assumptions previously applied by the Court in determining restitution—*e.g.*, in choosing the "2A" scenario over other "chronological" alternatives, choosing the "30-day" refund methodology, and concluding that Plaintiffs' expert, Mr. Olsen could reliably measure the "differentials"— continue to apply equally to the affirmed

claims. *See* Findings at 86-88. These determinations were, and continue to be, wholly consistent with the principles applied by the Court previously. None of those determinations need to be revisited at this stage, because they remain appropriate as to the affirmed claims, just as they did back in 2010.[8]

The previous restitution award continues to be the appropriate amount notwithstanding the fact that the Ninth Circuit found that Plaintiffs were preempted from pursuing relief under their separate fraudulent omissions theory. While the Court found that those omissions *also* constituted violations of the "fraudulent" prong and the FAL, it found that the bank's affirmative misrepresentations violated the statutes as well, and the Ninth Circuit affirmed a finding of class-wide liability without the omissions. *Gutierrez*, 704 F.3d at 726-30 ("Accordingly, the district court's holding that Wells Fargo violated the Unfair Competition Law by making misleading statements likely to deceive its customers is affirmed"). Both of these theories, independently, supported restitution in the amount previously awarded, and that amount remains appropriate under the theory left standing. Whether the issue is the bank's affirmative misrepresentations which promoted the false expectation of chronological posting, or the bank's failure to make affirmative disclosures to correct those deceptions, the appropriate measurement of restitution under both theories would be based on a comparison to what class members reasonably expected—which is the measure the Court previously ordered.

[8] For example, the Court will recall that Wells Fargo argued for application of an alternative "scenario" whereby checks were posted before debit card transactions. The Court rejected that approach (and similarly rejected an approach where credits were posted after some debits), finding that that Bank had never applied these posting orders in California and that "[t]he only reason that Wells Fargo now suggests radical rearrangements and manipulations of credits, checks, and ACH transactions is to artificially minimize the restitution awarded to the class." Indeed, at trial, Wells Fargo's Kenneth Zimmerman testified on direct examination that a posting order whereby all checks and ACH were posted before all debit cards was not "viable" because of the risk associated with the fact that all debit card transactions, once authorized, are "must pay" from the bank's perspective. Tr. at 1472-73. These same findings and testimony continue to support the selection of the "2A" measurement over the "checks first" measures. Moreover, ordering debit cards before checks and ACH is more consistent with class members' expectations of chronological posting because all debit card transactions that post on a given day, by definition, are authorized by the bank before any checks and ACH that post that same day.

B. Post-Judgment Interest Should Run From The Date On Which The Original Judgment Was Entered.

Under established Ninth Circuit law, post-judgment interest on any post-remand judgment should begin to accrue from the date on which the original Judgment was entered. The Court entered the Judgment on October 25, 2010. The original Judgment and the Findings upon which it was premised meaningfully ascertained Wells Fargo's liability for restitution and, thus, post-judgment interest runs from the date of that Judgment. Therefore, despite the Ninth Circuit vacating the Judgment on appeal, should this Court enter a new judgment in 2013, the date from which to start calculating post-judgment interest must be October 25, 2010.

The "purpose of post-judgment interest is to compensate the successful plaintiff for being deprived of compensation for the loss from the time between the ascertainment of the damage and the payment by the defendant." *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 835-36 (1990) (citation and internal quotation marks omitted); *see also Exxon Valdez v. Exxon Mobil Corp.*, 568 F.3d 1077, 1080 (9th Cir. 2009). The Ninth Circuit has "rejected the idea that 'post-judgment interest should apply only from the date of the second judgment whenever the first judgment is reversed and remanded.'" *Guam Soc'y of Obstetricians & Gynecologists v. Ada*, 100 F.3d 691, 702 (9th Cir. 1996) (quoting *Handgards, Inc. v. Ethicon, Inc.*, 743 F.2d 1282, 1298 (9th Cir. 1984)). Thus, even if an earlier judgment has been vacated, that judgment may nevertheless trigger the accrual of post-judgment interest if the "second judgment remains the same – in the same amount, for the same damages incurred during the same period." *Handgards*, 743 F.2d at 1299 (citing *Twin City Sportservice, Inc. v. Charles O. Finley & Co.*, 676 F.2d 1291, 1311 (9th Cir. 1982)).

To determine which judgment triggers the accrual of post-judgment interest, courts must consider "the nature of the initial judgment, the action of the appellate court, the subsequent events upon remand, and the relationship between the first judgment and the modified judgment.'" *Guam Soc'y*, 100 F.3d at 702. "[I]nterest ordinarily should be computed from the date of the original judgment's initial entry when the evidentiary and legal bases for an award were sound." *Exxon*, 568 F.3d at 1080 (citing *Planned Parenthood of Columbia/Willamette Inc.*

v. Am. Coal. of Life, 518 F.3d 1013, 1017-18 (9th Cir. 2008)). In *Exxon Shipping Co. v. Baker*, the Supreme Court vacated the original judgment for punitive damages against defendants and remanded for the Ninth Circuit to remit the award. *See* 554 U.S. 471, 515 (2008). Subsequently, the Ninth Circuit decided whether post-judgment interest would run from September 24, 1996, the date of the district court's original judgment, or the Ninth Circuit's judgment on remand in 2008. 568 F.3d at 1079. Concluding that "plaintiffs' entitlement to punitive damages was 'meaningfully ascertained' when the original district court judgment was entered in 1996," the court held that post-judgment interest began to accrue based on that judgment. *Id.* at 1080. The court explained that the first judgment controlled because "[n]either the evidentiary basis for the award nor the legal foundation for an award has been disturbed after nearly a dozen years of subsequent litigation." *Id.*[9]

Here, the legal and evidentiary bases of liability underlying the original Judgment were affirmed on appeal. Therefore, post-judgment interest should accrue as of the date of the entry of the original Judgment.

C. Plaintiffs Have Consistently Pursued Restitution for The Affirmed Claims.

Plaintiffs have consistently pursued class restitution for their "fraudulent" prong and FAL claims—before, during, and after trial. Nonetheless, in its recent Notice of Intent to Oppose, Wells Fargo indicated that it will argue Plaintiffs have waived their right to *any* restitution for their UCL and FAL claims, citing as the purported sources of the waiver a February 2010 email and subsequent filing. *See* Docket No. 572. Notably, Wells Fargo has never before made this argument, before this Court or on appeal, and in any event it lacks merit.

In the operative complaint, Plaintiffs asserted claims under both the "unfair" and "fraudulent" prongs of the UCL and under the FAL, as well as claims for common law fraud and negligent misrepresentation. Docket No. 30 ("Complaint"). Plaintiffs sought restitution, damages, punitive damages, prejudgment and postjudgment interest, and injunctive relief.

[9] *Exxon Valdez* follows a long line of Ninth Circuit cases in which the court affirmed awards of post-judgment interest based on the date of a reversed or vacated a judgment or award. *See Guam Soc'y*, 100 F.3d 691,703 (9th Cir. 1996); *Handgards*, 743 F.2d at 1298-99; *Twin City*, 676 F.2d at 1311.

Complaint at 15-20.

In May 2009, as part of a series of orders, the Court: (a) granted in part and denied in part Wells Fargo's motion for partial summary judgment, permitting the named plaintiffs to pursue individual claims with respect to certain of Wells Fargo's affirmative representations; (b) granted summary judgment as to some claims; and (c) upheld Plaintiffs' class claims under the "unfair" and "fraudulent" prongs of the UCL, the FAL, and for common law fraud and negligent misrepresentation. *See* Docket Nos. 245-247. Plaintiffs thereafter continued to pursue their statutory claims on a class-wide basis, and Plaintiffs' expert conducted data analyses for use in measuring class restitution.

In February 2010, after Plaintiffs' expert, Mr. Olsen, completed his analysis, Wells Fargo filed what was essentially a motion to exclude Mr. Olsen's expert testimony. The day before Wells Fargo filed its motion, in response to an inquiry from Wells Fargo's counsel, Plaintiffs' counsel sent an email indicating that Plaintiffs had "not attempted to quantify the amount of damages or restitution resulting from any classwide misrepresentation-based claims, and we do not intend to seek such *damages* at the upcoming trial. Accordingly, it is not necessary for your motion to seek to preclude the recovery of classwide misrepresentation-based *damages*…." Docket No. 293-11 (emphasis added). While Wells Fargo now apparently will attempt to argue otherwise, this statement, limited to "damages," was intended to apply to Plaintiffs' common law fraud and negligent misrepresentation claims only, and was not intended to apply to restitution under the UCL or FAL.[10] (After the Court subsequently offered a *sua sponte* clarification that Plaintiffs had a live class common law fraud claim, Plaintiffs pursued damages and punitive damages on those claims. *See* Docket No. 338 at 19-20.)

In addition, subsequently Plaintiffs made abundantly clear on several occasions that they were in fact seeking restitution under the "fraudulent" prong of the UCL. On April 13, 2010, when Plaintiffs filed their pre-trial Proposed Findings of Fact and Conclusions of Law (Docket No. 375), Plaintiffs stated, for example:

[10] On March 4, 2010, Plaintiffs re-stated their position in opposing the motion to exclude expert testimony. Docket No. 316 at 14 (emphasis added). Again, this statement was intended to apply only to class *damages* for the common law misrepresentation claims.

- Wells Fargo deliberately fostered [the belief that debit card transactions would be debited chronologically] in widely-disseminated educational and promotional materials, informing the public that money is deducted "immediately" or "automatically" from their account at the time the merchant obtains authorization. Docket No. 375 at 6.

- Plaintiffs and the Class were likely to be deceived about Wells Fargo's manner of grouping and posting debit card transactions, given Wells Fargo's widely-disseminated representations that when customers make debit card purchases the funds are deducted from their accounts "immediately" or "automatically." *Id*. at 7-8.

- As a result of Wells Fargo's unfair and deceptive reordering practices, its failure to disclose such practices…*and its misrepresentations related to such practices*, Plaintiffs and the Class paid Wells Fargo $214,379,710.68 more in overdraft charges than they would have paid had Wells Fargo posted their debit transactions that posted on each calendar day chronologically, based on the date and time that Wells Fargo authorized the transactions. *Id*. at 8 (emphasis added).

- **Restitution** Under the UCL, once liability is established, Plaintiffs and the class are entitled to restitution of "any money…which may have been acquired by means of such unfair competition." *Id*. at 22 (quoting Cal. Bus. & Prof. Code 17203). *Id*. at 22.

- **Class Claim for False Advertising**. *As restitution is being awarded pursuant to the UCL, there is no need to separately calculate the amount to which the class is entitled pursuant to its companion statute, the False Advertising Law. Id*. at 23 (emphasis added).

On May 3, 2010, following the close of Plaintiffs' case-in-chief, Wells Fargo filed a Motion for Judgment on Partial Findings on the common law claims and the "fraudulent" prong and FAL claims. Docket No. 417. Far from asserting that Plaintiffs had waived any right, prior to trial, to class restitution under the "fraudulent" prong and FAL, Wells Fargo argued in its motion, incorrectly, that Plaintiffs had failed to present evidence at trial that class members were harmed by the bank's misrepresentations. *Id*. at 14.

On May 19, 2010, Plaintiffs filed their post-trial Proposed Findings of Fact and Conclusions of Law. Consistent with their pre-trial filing, Plaintiffs again specifically requested class-wide restitution for their "fraudulent" prong and FAL claims. *See, e.g.*, Docket No. 453 at 16-20, ¶¶ 173-174, 196, 213, 216, 223, 232-236.

On May 25, 2010, Wells Fargo filed its response to Plaintiffs' post-trial Proposed Findings of Fact and Conclusions of Law. Docket No. 454. While Wells Fargo took the position that Plaintiffs were foreclosed from pursuing *damages* for their common law claims, it did not

assert that *any* claims for *restitution* under the UCL or FAL had been waived. To the contrary, Wells Fargo expressly recognized the distinction between damages for the common law claims and restitution for the statutory claims in its response:

> There can be no class damages in this case, for multiple reasons. Indeed, plaintiffs conceded before trial that no award of class damages (in contrast to restitution) would or could be sought. Nor could class damages be awarded, given the absence of class-wide proof of actual injury from any alleged misrepresentation. For a non-UCL claim—damages may not be recovered under the UCL—any such showing must include, *inter alia*, proof of class-wide dissemination of the same or similar misrepresentations, as well as class-wide proof of actual reliance *and* resulting causation of injury."

Id. at 67, ¶ 231 (citations omitted); *see also id*. at 60, ¶ 216. It is apparent from this passage that Wells Fargo fully comprehended that Plaintiffs' February 17, 2010 email and subsequent statement in the March 4, 2010 filing referred only to the *damages* for the common law claims.

"The waiver of a legal right cannot be established without a *clear showing of intent* to give up such right….The burden is on the party claiming the waiver to prove it by clear and convincing evidence that does not leave the matter doubtful or uncertain." *Utility Audit Co., Inc. v. City of Los Angeles*, 112 Cal. App. 4th 950, 959 (2003) (citations omitted). Wells Fargo cannot satisfy this significant burden. To the contrary, the record affirmatively demonstrates that there has been no waiver. Plaintiffs pursued class restitution from the start of this litigation, and specifically pursued such relief on their "fraudulent" prong and FAL claims before, during, and after trial. Indeed, the fact that the Court entered Judgment awarding restitution on *all claims* on which Plaintiffs prevailed at trial, conclusively establishes that the Court has effectively held that Plaintiffs did *not* waiver their right to restitution under the "fraudulent" prong or FAL.

The Court should reject this latest effort by Wells Fargo to seek complete impunity.

D. There is No Need To Re-Litigate The Numerous Issues That Have Already Been Fully Tried.

Wells Fargo has not clearly articulated to Plaintiffs what it believes should happen next, in the event the Court does not agree either with Plaintiffs' threshold argument that the Judgment already applies by its literal terms or Wells Fargo's threshold waiver argument. As best as Plaintiffs can tell, Wells Fargo's position will be that there is no record supporting the proper

measurement of restitution for the affirmed claims. Thus, before this Court could enter a restitution award on those claims, Wells Fargo would apparently have the parties start from square one, re-opening discovery, conducting new data analyses, submitting challenges to the analyses, and re-litigating any number of issues that have already been fully tried and decided by this Court. That is completely unnecessary. This Court has made numerous determinations, on a full record, that are wholly applicable to (in fact, in Plaintiffs' view, fully determinative of) the issue of restitution on the affirmed claims. These determinations were made after extensive litigation, where the parties had the opportunity to present evidence, test the other party's evidence, and provide whatever argument they wanted to provide for or against any position. The Court should resist any attempt by Wells Fargo to re-litigate issues that have already been tried and decided.[11]

E. The Court Should Award Pre-Judgment Interest.

The Court previously denied Plaintiffs' initial request for pre-judgment interest. *See* Docket No. 497.[12] It should reconsider its previous ruling, and order pre-judgment interest at this time.

The equitable case for awarding pre-judgment interest has become significantly stronger since the Court last considered the issue. Nearly three additional years have passed with the more than 1 million class members still being denied relief, meaning that some class members have now been denied relief for as long as *eight or nine* years since the excessive fees were assessed. During this time, Wells Fargo has had exclusive use and benefit of its ill-gotten gains. If Wells Fargo successfully drags this litigation out for several more years, it may earn more in interest (at the statutory pre-judgment interest rate) than the amount of the Judgment. Such a result would defeat the very purpose of the UCL to deter wrongful conduct. This is particularly true now that the Ninth Circuit has affirmed that Wells Fargo committed fraudulent business practices. As a

[11] To the extent the Court finds it cannot determine the proper restitution amount on the current record, Plaintiffs should be given the opportunity to supplement the record as may be necessary.

[12] The Ninth Circuit declined to reach the issue of pre-judgment interest in light of its decision vacating the restitution award and its remand regarding the same. *See Gutierrez*, 704 F.3d at 730 n.10.

matter of equity, Wells Fargo should not be permitted to retain its considerable ill-gotten gains without paying interest to the class members from whom those funds were taken.

Moreover, pre-judgment interest should be awarded under the mandatory provision of Cal. Civ. Code § 3287(a). The restitution here is a function of specific instances of overdraft charges, the individual dollar amounts of which were never in dispute, incurred on specific days. *See Bott v. American Hydrocarbon Corp.*, 458 F.2d 229, 232 (5th Cir. 1972) (awarding pre-judgment interest under section 3287(a) where "[t]he jury was not called upon to calculate a disputed wage rate but to decide how many payments at the predetermined rate were not made."); *Dalgarn v. Robbins, Dalgarn, Berliner & Carson*, 2003 WL 22511462, *8 (Cal. App. Nov. 6, 2003) ("Nor does it matter that, at trial, defendants may have presented more than one way of calculating damages, with differing results."); *Reedy v. Bussell*, 2009 WL 884606, * 18 (Cal. App. Apr. 2, 2009) ("the expert's calculation of two different amounts does not render either calculation 'uncertain;' instead, it reflects two 'certain' alternatives-one or the other of which the court can apply….").

Should the Court find the award of prejudgment interest is appropriate, Plaintiffs will need Wells Fargo to again provide Plaintiffs' expert access to the transactional data for the class so that he can perform the necessary calculations. Plaintiffs would then promptly submit a supporting brief showing the calculations.[13]

IV. CONCLUSION

Accordingly, Plaintiffs respectfully request that the Court: (a) re-enter judgment, as to the "fraudulent" prong and False Advertising Law claims for which class-wide liability was affirmed by the Ninth Circuit, for restitution in the amount of $202,994,035.46; (b) order that post-judgment interest accrue from the date of the entry of the original Judgment, *i.e.*, from October 25, 2010; (c) enjoin Wells Fargo from making false and misleading representations about its

[13] As an example of how pre-judgment interest would be calculated: If class member John Doe incurred two excess overdraft fees (as calculated under the 2A scenario) totaling $70 on January 1, 2006, interest on that $70 amount would run beginning January 1, 2006 through the entry of Judgment. If John Doe also incurred three excess overdraft fees totaling $105 on July 15, 2007, interest on that $105 amount would run, separately, beginning July 15, 2007 through the entry of Judgment, and so on. These calculations can be performed class-wide as a matter of simple programing once Plaintiffs are given access again to the class data.

posting order; and (d) award pre-judgment interest in an amount to be calculated by Plaintiffs' using the transactional data for the class.

Dated: March 14, 2013

Respectfully submitted,

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